FOO KIM FONG & ANOR.

v.

FOO KIAT FONG

HIGH COURT MALAYA, SHAH ALAM
DATO JAMES FOONG J
[ORIGINATING MOTION NO. 25-30-93]
3 AUGUST 1994.

***LAND LAW**: Administrator of estate disposing of certain land pursuant to Court order - Beneficiary of residual estate entering caveat against the land - Registered proprietors of said land applying for removal of caveat - Whether beneficiary has caveatable interest in the said land - Whether applicants entitled to removal of caveat.*

The administrator of the estate of one Kee Thin applied to the Court to dispose off a number of landed properties in the estate of Kee Thin. The beneficiary of the estate of one Voon Kwai, which had a residual share in the estate of Kee Thin lodged a caveat against one of the lands (the said land). The registered proprietors of the said land applied for the removal of the caveat.

The question that arose was whether a beneficiary who is entitled to a share in the general residue of an estate is entitled to register a caveat on a piece of land which once belonged to the estate.

Held:

[1] A long chain of judicial authorities has established the principle that a beneficiary who is only entitled to a share of the general residue has no right to enter a caveat against the property of the estate when no part of the property of the estate has been expressly or impliedly devised and bequeathed under a trust created for his benefit.

[2] The respondent in this case is a beneficiary to the estate of Kee Thin through that of his father's estate Voon Kwai. As the respondent's share is toward the estate of Kee Thin, which share has not been ascertained, he has no caveatable claim to title and registrable interest on the said land.

[3] Further, the said land is no longer registered in the name of Kee Thin or his estate. It has been lawfully transferred and registered in the name of the applicants through a valid Court order. The respondent has made no claim against the applicants nor towards the estate of Kee Thin and the failure to institute such a claim is fatal to the respondent in a hearing for the removal of the caveat.

[4] In the circumstances, the Court was not required to consider whether the respondent had raised a serious question to be tried as the preliminary prequalifications were not fulfilled.

[Application for removal of caveat allowed with costs. Damages to be assessed].

Cases referred to:
Khoo Teng Seong v. Khoo Teng Peng [1990] 3 MLJ 37 ***(foll)***
Lee Ah Thaw & Anor. v. Lee Chun Tek [1978] 1 MLJ 173 ***(foll)***
Jit Kaur v. Parl Singh [1974] 2 MLJ 199 ***(refd)***
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

For the applicants - C.W. Lam; M/s. Prasad Abraham & Partners
For the respondent - Bhag Singh; M/s. L.H. Chua & Co.

JUDGMENT

James Foong J:

This is an application by the applicants, the registered proprietors of a piece of property held under Geran 19165 for Lot No. 15, section 4, Bandar Semenyih, Selangor (hereinafter referred to as the said land), to remove a caveat levied on the said land by the respondent.

The respondent claims that he is a beneficiary to the estate of one Foo Voon Kwai. Foo Voon Kwai (Voon Kwai for short) was one of the beneficiaries to the estate of Foo Kee Thin (Kee Thin in short). When Kee Thin passed away in 1938, letters of administration was granted to Voon Kwai and another by the name of Foo Voon Kai (Voon Kai for short). The said land was one of the many pieces of land belonging to the estate of Kee Thin.

Voon Kwai passed away in 1947 and letters of administration to his estate was granted to Voon Kai. For the estate of Kee Thin, Voon Kai became the sole administrator upon the death of Voon Kwai.

Sometime in 1972, Voon Kai as administrator of the estate of Kee Thin applied to the Court to dispose off a number of landed properties in the estate of Kee Thin. One of these properties was the said land. The Court consented to his application of disposal and the said land was sold and subsequently registered in the names of the applicants as proprietors.

In 1971, the respondent, his brother and sister, the children of Voon Kwai came of age. They applied and obtained an order of Court to revoke Voon Kai as the administrator of their father's estate, Voon Kwai. This was granted and in pursuant to this, letters of administration *de bonis non* for the estate of Voon Kwai was granted to the respondent. Also granted was an order for accounts to be supplied by Voon Kai, the former administrator of the estate of Voon Kwai.

Since 1975, the respondent has levied caveats on the said land. When the first caveat lapsed, another was placed thereon until the latest, being the caveat registered in 1991. This is the caveat that this Court has now to deal with since, all earlier caveats having lapsed require no further consideration.

The caveat placed by the respondent in 1991 on the said land has the following endorsement on the application form 19B. It is as follows:

> Alasan-alsan tuntutan saya ke atas tanah itu adalah - Bahawa saya adalah berhak terhadap tanah yang diperihalkan dalam jadual di bawah ini yang mana-mana butir-butir diterangkan dalam Surat Akuan saya yang dilampirkan.

In the statutory declaration attached thereto, the respondent affirmed that;

(1) Voon Kai as administrator of the estate of Kee Thin has disposed and transferred the said land to the applicants through a Court order obtained by misrepresentation and fraud and;

(2) that letter of administration to the estate of Voon Kwai granted to Voon Kai as administrator was revoked and now letter of administration *de bonis non* was granted to respondent and;

(3) that, "In order to protect my lawful rights and interests in the said land I hereby crave leave to enter a private caveat against the said land".

In the affidavit of the respondent filed to oppose this applicants' application, the respondent gave his particulars of misrepresentation and fraud as follows:

(1) Voon Kai in his affidavit filed in support of his application to sell the landed properties of the estate of Kee Thin falsely affirmed that he was a beneficiary to the estate of Kee Thin;

(2) in this said affidavit, Voon Kai, willfully omitted the respondent his brother and sister as lawful children of Voon Kwai;

(3) falsely claiming in the said affidavit that Voon Kai and Voon Kwai were brothers when they were only cousins and

(4) Voon Kai falsely and wilfully affirming on the said affidavit that all surviving beneficiaries of the estate of Kee Thin had executed letters of consent when the respondent, his brother and sister have executed none nor have they given any such consent for the sale of the properties.

As rightly submitted by the applicants' Counsel, the first issue for this Court's determination is whether the respondent has a caveatable claim to title and interest in the said land. On this, the burden of proof must be upon the shoulders of the respondent. The respondent's main contention as can be seen from the above is that he is a beneficiary to the estate of Voon Kwai which, in turn has a residual share in the estate of Kee Thin. As correctly calculated by the applicant's Counsel, at most the respondent's share in the estate of Kee Thin would be a maximum of 1/21 share in view of the fact that there are a number of beneficiaries in this estate. Nevertheless, the issue still remaining is whether a beneficiary who is entitled to a share in the general residue of an estate is entitled to register a caveat on a piece of land which once belonged to the estate.

A long chain of judicial authorities has established the principle that such an interest does not constitute a caveatable claim to title and registrable interest over such land. In the case of *Khoo Teng Seong v. Khoo Teng Peng* [1990] 3 MLJ 37, Lim Beng Choon J has laid down exhaustively the laws on such rights relating to caveats. This Court need not proceed to reiterate every supporting authority on this point except, to highlight the law expounded in the judgment of Lee Han Hoe CJ in *Lee Ah Thaw & Anor. v. Lee Chun Tek* [1978] 1 MLJ 173. It is as follows:

> Mention may be made of the case of *Liew Siew Yin & Anor v. Lee Pak Yin* [1940] MLJ 135 where the plaintiffs were residuary beneficiaries. The Court held that irrespective of whether the plaintiffs' interest was vested or contingent and although the land was subject to a trust for sale the plaintiffs were entitled to present a caveat. In my opinion this case was wrongly decided as the whole right of the property was in the deceased's personal representative and until the administration was completed and the residue ascertained the residuary beneficiaries could claim no interest in such property. SK Das, the learned author of the *Torrens System in Malaya* (see p. 339), is also of the view that *Liew Siew Yin's* case [1940] MLJ 135 cannot be supported either in principle or on authority.

The case of *Jit Kaur v. Parl Singh* [1974] 2 MLJ 199 cited by the respondent in support, to this Court's mind, would not be able to withstand the avalanche of authorities decided otherwise. In any event, this Court is bound by *Lee Ah Thaw's* case as it was a Federal Court decision as compared to that of *Jit Kaur's* which was decided by a Court of concurrent jurisdiction.

The law on this issue is very clear and this Court could not have put it more aptly than Lim Beng Choon J in *Khoo Teng Seong's* case when the learned Judge stated as follows:

> But a beneficiary, who is only entitled to a share of the general residue has no right to enter a caveat against the property of the estate when no part of the property of the estate has been expressly or impliedly devised and bequeathed under a trust created for his benefit.

The respondent in this case is a beneficiary to the estate of Kee Thin through that of his father's estate Voon Kwai. As the respondent's share is towards the estate of Kee Thin which has not been ascertained, he has no caveatable claim to title and registrable interest on the said land.

In addition to all these, the said land is no longer registered in the name of Kee Thin or his estate. It has been lawfully transferred and registered in the names of the applicants through a valid Court order. The respondent has made no claim against the applicants nor towards the estate of Kee Thin. With this, this Court shall turn to deal with another precondition which must be satisfied by the respondent before this Court can even proceed to consider whether there is a serious question to be tried and thereafter to evaluate the balance of convenience as stated in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212.

Presumably even if the respondent has a caveatable interest over the said land, there is up to the date of hearing this application no claim filed against either the applicants to declare their proprietorships over the said land null and void nor, is there any claim made against the administrator of the estate of Kee Thin or the estate itself. Failure to institute such claim is fatal to the respondent in a hearing for the removal of the caveat (see the case of *Hew Sook Ying*) the duty is upon the respondent to file such claims. However, as this is not done, the respondent's caveat on the said land should be removed.

As to the issue of whether the respondent has raised a serious question to be tried, this Court need not dwell into it as the preliminary pre-qualifications stated earlier are not fulfilled.

Therefore, for reasons stated above, this Court allows the applicants' application with cost and, orders that the Senior Assistant Registrar do proceed to access damages suffered by the applicants due to the respondent's caveat entered on the said land on 14 March 1991.